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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1572 Misc.

THOMAS STACK,

Petitioner,

v.

THE STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE NEW YORK DEPARTMENT COURT, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Pursuant to the Revised Rules of this Court, Rule 24, the respondent submits this brief in opposition to the captioned petition for a writ of certiorari.

Questions Presented

1. Should *Spano* v. *New York*, 360 U. S. 315, and *Massiah* v. *United States*, 377 U. S. 201, be made retroactive in their effect on a case that is no longer in the normal appellate process?

2. Is the totality of circumstances test appropriate to the instant case?

3. Was the admission into evidence with limiting instructions to the jury of the unredacted confession of a jointly tried co-defendant harmless error?

Statement

In the following statement of the facts, any number in parentheses refers to the folio of the printed record in the companion case of *People* v. *Simmons*, 277 A. D. 986, 99 N.Y.S. 2d 936 (this petitioner never having appealed), unless that number is preceded by the letter "R" in which event it refers to the record of the hearing held before the County Court of Westchester County, Honorable P. Raymond Sirignano, J., in June, 1967.

On December 1st, 1947, the three defendants, John Simmons, John O'Hara and Thomas Stack, came from New York City to Yonkers to rob the members of the Ross Calcagno Club, a Democratic Party Ward Club and a social club. They carried with them two guns, one loaded and one unloaded. They entered the Club, held up the members present, and took money from some of them. While the robbery was in progress, another member entered and the defendant O'Hara then shot and killed Joseph Polito, one of the members. The defendant John Simmons had the unloaded revolver in his hand and was using this to help cow the members. He did not know any gun was loaded. When the shots were fired, the other members subdued both Simmons and O'Hara. The defendant Stack fled and was later captured in California. Yonkers police came to the scene within a few minutes and took Simmons and O'Hara into custody.

John Simmons testified in his own behalf that on the afternoon of December 1, 1947, he and Stack had come up from New York to Yonkers to look over the Ross Calcagno Club (3215-3218) and then returned in the evening with O'Hara, and the three planned the holdup

(3227). Simmons believed that both guns they had were empty (3229), and no shooting was to take place (3232). The three entered and took two fellows in a front room into the rear, and searched three or four members in addition to one Carozza (3232). His sole defense to the charge of felony murder was that when the deceased cried out to an entering member to grab the defendant Stack, that then he tried to get out and was jumped on and was on the floor before the shot was fired (3235-3238). Simmons conceded that his confessions to the District Attorney (Peo's. Exhs. Nos. 35, 36 and 37 at folios 2536 to 2673) were voluntary and true except for the initial concealment of the identity of Stack and details concerning the hiding place of the guns (3239-3252).

This Club was a converted store at 254 New Main Street, City of Yonkers, in the County of Westchester (630). It had an outer room with chairs for lounging and an inner card room (see 4085 to 4109). Of the 19 persons who were in the Club, the People produced 17 as witnesses, and the two who did not testify were shown to have died in the interval (958, 1724). Each of these eyewitnesses identified Simmons as a participant in the holdup.

Simmons and Stack each entered holding guns, Simmons searched Ray Carozza, took his money, and remained standing over one of the card tables with a nickel-plated gun in his hand (1029, 1032, 1044, 1071). In the meantime, O'Hara had taken the Luger from Stack and had begun to search the other card-players and take money from their pockets and the table in front of each, but, before he could complete the rounds, one Mario Prota, known as "Joe," entered the outer room and the deceased called to him to grab Stack, Immediately O'Hara stepped back and fired into Joseph Polito's back (1288-1325, 1126-1183, 1033-1035), With the first shot, the witness, Ray Carozza, jumped for Simmons and was himself shot in

the shoulder, but he did grab Simmons (1984) and the witness, Fred Castaldo, grabbed Simmons' gun (1697). The witness DeMarco dove for O'Hara after the shots (1187). Neither O'Hara nor Simmons was struck, nor was on the floor until after the shots went off (1060-1063, 1085, 1047). Simmons was in the room assisting in the robbery all during this time (711, 1085). When Prota entered, the robbery was still in progress, for three members had not yet been searched or their money taken (1308, 1758, 1717, 1185). Two of the members went out and brought in Officer Brooks (1718, 1728) and another called Headquarters (713).

Officer Brooks restored order and took the guns (2182) and turned them over to Acting Commissioner Comey (2184). Simmons admitted holding the nickel-plated gun and O'Hara the black one (335). About 11:00 P. M. on December 1, 1947, the two defendants were taken to Police Headquarters (336).

The appellant Stack made good his escape (2957-2961) and was not heard from again until March 21, 1948, when he was arrested in Long Beach, California, and charged under the name Michael McDonough with Burglary (R299, 467). By what means does not appear, but the New York City Police Department seems to have been notified of this arrest, but because they knew nothing of the murder investigation in Yonkers time passed, and when on March 25, 1948, Long Beach had received no word from New York City, they released the appellant, inasmuch as they regarded their own burglary charge as insufficient (R249; Deft's Exhibit "H", R526-a). On March 27, 1948, the confusion between New York City and Yonkers had been untangled, and Yonkers had telegraphed its hold instructions to Long Beach. Having let him go, Long Beach may have felt a certain responsibility for finding the appellant again, and their ensuing investigataion established that he had probably gone to San Diego. They so informed San Diego, who arrested him there on March 28, 1948

(People's Exhibit #2, R460 to 462). He was returned to Long Beach the same evening (R302) and on March 29, 1948, he waived extradition to New York (People's Exhibit 3K, R496). On the same date, Long Beach so advised Yonkers.

Pursuant to that information, the District Attorney of Westchester County, George M. Fanelli, Detective Lieutenant John J. Kennedy of the Yonkers Police Department, and Detective Sergeant Patrick Christopher of the same department, flew on March 29, 1948, to Los Angeles, California, arriving there in the early morning hours of March 30th (R189-190). Later on the same morning they went to the Office of the District Attorney of Los Angeles County, who assigned an investigator and a stenographer to assist them (R170; 191-192). All five then went to the Long Beach Police Headquarters, where Kennedy and Christopher interrogated the appellant initially (R227-228; 260-261). When Stack agreed to talk to Fanelli, the latter began his interrogation, which was recorded in shorthand by the stenographer loaned to Fanelli by the Los Angeles District Attorney (R261-262, 269). The statement was transcribed the next day and picked up, probably by Fanelli, at the District Attorney's Office (R262). It appears in this record as People's Exhibit No. 1 (R448-459). On March 31, 1948, however, the appellant refused to sign the statement (R197).

Nothing further appears to have been done that day, and on the following day, April 1st, all four men, the appellant, Fanelli, Kennedy and Christopher, left Los Angeles by plane for New York. New York was heavily fogged in though, so the airplane was diverted to Philadelphia, where it landed. They came from Philadelphia to New York by train and were met at the Pennsylvania Station by a detective who drove them to Yonkers (198). This was before the days of the four hour jet, so, what with the delay and the speed of the plane itself, the entire trip took

from 9:30 A.M. until just after midnight of the following day, April 2nd (R397).

Between midnight, then, and until 2:15 A.M. on the second of April, the appellant was interrogated by Deputy Police Commissioner William Comey, Captain Hollis, and Lieutenant Kennedy, and sometime within that period he signed the confession (R201-202). Christopher, during this period, was upstairs in Police Headquarters doing some paper work (R272).

We won't continue this narrative further, because it has now progressed to a point where the issues may be fairly framed. If further facts are necessary, they will be set forth under the appropriate points of argument. Thus we have here a case where no element of physical force or promises is claimed (R191). There is a claim by the appellant that he was threatened with death in the electric chair if he refused to confess (R191), but this is disputed by the police (R394, 402). He claims the police showed him the statements of his co-defendants, O'Hara and Simmons (R191), but this too the police denied (R221, 265). One final thing upon which both the appellant and the police agree is that prior to giving the statement on March 30, 1948, in Long Beach, he asked to see an attorney (R227, 272, 305). District Attorney, now Judge Fanelli did not recall that request, however (R174-175), nor did the police officers remember notifying him of it (R227-228, 262).

POINT I

Spano v. *New York* and *Massiah* v. *United States* should not be given retroactive effect.

Spano v. *New York*, 360 U. S. 315, was decided by this Court in June, 1959, and *Massiah* v. *United States*, 377 U. S. 201, was decided even later in May of 1964. The instant petitioner was convicted in December of 1948, over

a decade before the earlier of these two decisions. Both are distinguishable on their facts, but, leaving that aside, the far more fundamental decision this petition calls upon the Court to make is whether a doctrine first enunciated in 1959 governs a case that was concluded in 1948. There is, it is submitted, no persuasive reason to depart from either the standard or the reasoning of *Johnson* v. *New Jersey*, 384 U. S. 719, which was also a confession case.

There is little, if any, doubt that when the confession here complained of was secured it was properly secured in terms of the then operative New York and Federal laws. So ruled the Westchester County Court in the Huntley Hearing in this case. In that ruling it was affirmed by the New York Supreme Court, Appellate Division, Second Judicial Department, *People* v. *Stack*, 32 A. D. 2d 894, 302 N.Y.S. 2d 999, and the New York Court of Appeals, Honorable Francis Bergan, Associate Judge, perceived no advantage in further reviewing this ruling. Thus, the New York police and prosecutor in full compliance with the law took a statement from the petitioner which they had every right to believe was invulnerable. The petitioner, though, would have this Court rule that what was good then became bad ten years later and remains bad even yet. It is this sort of argument which prompted the New York Court of Appeals to remark:

> "The past can seldom be reformed in the image of the present, and it is manifest that not every type of conviction can be set aside where the wisdom of the present does not coincide with that of the past." *People* v. *McQueen*, 18 N. Y. 2d 337, 343

and

> "We have no valid basis for assuming our predecessors were so entirely wrong and we quite so entirely right about our views that we should undo what was correctly done many years ago according to the

> general understanding of lawyers on how the Constitution should be read." *People* v. *DeRenzzio*, 19 N. Y. 2d 45, 49.

It is respectfully submitted that the theory that the presence of counsel at *all* post-indictment interrogations is mandated by *Powell* v. *Alabama*, 287 U. S. 45, must be rejected. There the Court refers to

> ". . . the most critical period of the procedings against these defendants, that is to say, from the time of their *arraignment* until the beginning of their trial . . ." *id.*, at p. 57. Emphasis added.

It remained for the New York Court of Appeals to conclude that counsel must be present at all interrogation after *indictments*, *People* v. *DiBiasi*, 7 N. Y. 2d 544 (1960). All *Powell* commanded was that an attorney had to be at the defendants's side at all post-*arraignment* questioning. Even *Hamilton* v. *Alabama*, 368 U. S. 52, did not go as far as *DiBiasi*, because it too spoke in terms of arraignment, not indictment. So too did *Gideon* v. *Wainwright*, 372 U. S. 335, and *White* v. *Maryland*, 373 U. S. 59. It was only by the *Massiah* Court that the harsher New York rule was adopted and then only by the suggestion that *Powell* had always so held, *Massiah* v. *United States*, *supra*, at page 205.

However, the same cogent reasons for denying retroactivity to new interpretations of Constitutional Amendments which were relied upon in *Johnson* v. *New Jersey*, *supra*, must apply with equal and perhaps even more force to new interpretations by the Court of its own prior decisions. If, therefore, it now is the position of the Court that *Powell* v. *Alabama*, *supra*, has *always* barred post-indictment interrogation outside of the presence of counsel, then logically that assessment of *Powell* should speak only from the time of its original enunciation: the *Massiah* case of 1964.

POINT II

The totality of circumstances test of voluntariness has no application to this case.

The petitioner argues that:

> "The totality of circumstances surrounding petitioner's confession established that it was extorted after a relentless interrogation—during which he was held incommunicado, denied food and sleep and refused counsel—spread over a five day period in an inherently coercive atmosphere." Petition, p. 5

The respondent's immediate reaction to this is to ask, have these facts really been established? It is respectfully submitted that they have not. We have *allegations* that these things are so, but lawsuits, neither civil nor criminal, are not successful by reason of bigger and better allegations. Facts are what we went here, and we haven't any facts. We will agree that in Long Beach, California, the petitioner asked the Yonkers police if he could consult an attorney and that this request was disregarded. We will also agree that he was arrested in San Diego, California, on March 28th and that he was first remanded to the Westchester County Jail in New York on April 2nd, but we cannot, nor will we, agree that his confession was extorted, that he was relentlessly interrogated, that he was held incommunicado, that he was denied food and sleep, or that the atmosphere in which he found himself was inherently coercive. Quite to the contrary, in the writer's own small experience with venturing outside his own jurisdiction to secure the custody of a fugitive, there attends these junkets a Sunday school picnic kind of climate.

In the cases the petitioner cites in support of his position, *Chambers* v. *Florida,* 309 U. S. 227; *Blackburn* v. *Alabama,* 361 U. S. 199; *Lynumm* v. *Illinois,* 372 U. S. 528;

and *Haynes* v. *Washington*, 373 U. S. 503, the Court was dealing with an agreed upon set of facts, facts upon a consideration of which the various State courts had come to what this Court concluded was an incorrect legal conclusion. Here the allegations of the petitioner and those of the State's witnesses were sharply contradictory. There is attached as an appendix hereto a copy of the decision of the County Court of Westchester County following the Huntley Hearing. At no point did the Court expressly find the petitioner's allegations to be false, but, it is submitted, there runs through the entire opinion the strong flavor of disbelief in those allegations. On that basis alone, it is submitted, the Court should approach any consideration of this argument from the point of view that the petitioner's facts are, at the very least, of dubious authenticity. Further than that, though, it would be difficult to believe that the County Court and the Appellate Division of the Supreme Court which affirmed it could have placed any credence at all in his story and yet blandly ruled against the clear mandate of the cases he cites to this Court. In sum, then, the respondent disputes the petitioner's facts, a position in which we are fully supported by the State courts, and it is submitted that, the question of credibility having twice been decided, it is a question to which this Court need not again address itself.

POINT III

Bruton v. *United States* does not govern this case.

In May of 1968 this Court, in *Bruton* v. *United States*, 391 U. S. 123, held that the admission into evidence of the confession of one co-defendant at the joint trial of himself and a non-confessing co-defendant was error despite the fact that the trial court had admonished the jury that they were not permitted to consider that confession as against the non-confessing co-defendant. In doing so,

the Court expressly overruled *Delli Paoli* v. *United States*, 352 U. S. 232, which for a decade had stood for the contrary rule. In doing so, it renounced the basic premise of *Delli Paoli* and embraced the view of the dissenting Justices:

> "The dissent went on to say, as quoted in the cited note in Jackson, 'The government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.' " *Bruton* v. *United States, supra*, p. 129.

In other words, as we read this language, the jury is prohibited from taking certain information into account, not because of some infirmity in the information itself, but because of an infirmity in the form in which it comes to them. The necessary converse of this thesis is that if that data comes to them in some acceptable form it may be considered by the jury, and in this case it came not alone from the tainted source, the co-defendants' confessions, but also from the petitioner's own.

The respondent has reviewed all six statements given by the petitioner and his co-defendants, three by Simmons, two by O'Hara and one by the petitioner himself. If the Court deems their presentation to the court necessary, we will, of course, hand copies of them up, but in our best evaluation of them they are virtually identical. Two, which were secured by the District Attorney at Police Headquarters just a few hours after the shooting, were by Simmons and O'Hara. In each, these two men admitted their own participation in the holdup, but they were trying to protect the petitioner, so they referred to him as Dolan. Because they had come to Yonkers in the petitioner's automobile, they also, each of them, said that they had come by trolley. Aside from those subterfuges, the

story each of them told is in full and complete agreement with the other, and both agree with that ultimately given by the petitioner. Later the same morning, the District Attorney took a second statement from both Simmons and O'Hara, but these were limited to the background of each man, and neither makes any further reference to the details of the robbery. Two days later Simmons disclosed the petitioner's true name to the District Attorney, and a third and final statement was then taken from him. It differed from the first only in that it discusses "Dolan's" activity as having been performed by the petitioner, and indicated they came in his car. The third Simmons statement is virtually a carbon copy of the petitioner's, and the first divergence between the two occurs when the petitioner ran away from the robbery while Simmons continued to discuss his almost immediate apprehension.

This case, therefore, is perhaps even more perfect a case than *Harrington* v. *Califonia*, 395 U. S. 250, because here, unlike *Harrington*, each statement is virtually identical to the others. Consequently, if it be a violation of *Bruton* to have tried these three men jointly in the circumstances, it is truly harmless in every sense.

CONCLUSION

The petition should be in each and every respect denied.

Respectfully submitted,

CARL A. VERGARI,
District Attorney of
Westchester County.

By: JAMES J. DUGGAN,
Administrative Assistant District Attorney,
Of Counsel.

May 13, 1970.

APPENDIX

Opinion of County Court, Westchester County, Honorable P. Raymond Sirignagno, J., dated March 27, 1968.

The defendant and two others were indicted on December 12, 1947 for Murder in the First Degree. In 1948, after a trial by jury, this defendant and his co-defendants were convicted of Murder in the First Degree and sentenced to life imprisonment. On defendant's motion, this Court directed that a hearing be held to determine the voluntariness of the defendant's statement. Upon such hearing, the following pertinent testimony was adduced.

The first witness for the People was the Honorable George W. Fanelli, who testified that he is presently a Justice of the Supreme Court and in December of 1947 was District Attorney of Westchester County. In 1947, he investigated the death of one Joseph Polito, and in the course of the investigation questioned the defendant Stack in the State of California. Officers Kennedy and Christopher of the Yonkers Police Department were present with him at that time and that Viola J. Daniel of the Los Angeles District Attorney's Office took the statements from Stack. He testified that there was no physical abuse of Stack, nor were any promises made to him, nor were any threats made against him in order to obtain his statement.

On cross examination he testified that the date of the indictment was December 12, 1947. He testified that a telegram was received advising that the defendant Stack had been apprehended in California and that he immediately went there. He assumed that Stack had waived extradition. He did not remember whether the statement was signed in California or New York, but that defendant offered this statement upon the trial. He did not recall how long it took to take the statements and that Viola

Daniel's services were provided for by the Los Angeles District Attorney's Office as a courtesy. He did not recall whether he had the statements made by the co-defendants O'Hara and Simmons with him in California when Stack was questioned. He testified that he spoke to Stack and that he did not recall whether Detectives Christopher and Kennedy spoke to the defendant at all. He testified that he did not, to the best of his knowledge, ask the defendant Stack whether he wanted a lawyer, and that to the best of his recollection, Stack did not ask to see any lawyer. He did not remember whether the statement made by the defendant Stack was signed by him before or after arraignment. He testified that Stack testified on his own behalf and that no objection was made to this statement being received in evidence. He testified that no claim that any force was employed in order to obtain Stack's statement.

On re-direct examination he testified that he did not recall going before any local judge in California with the defendant Stack and that no complaint of any abuse was made by Stack. Stack's statement was typed before they left California.

John J. Kennedy testified that he is presently a Captain in the Yonkers Police Department and that in 1947 and 1948 he was a Lieutenant assigned to the Detective Bureau. He testified that they returned to Yonkers from California at 12:00 A.M. on April 2, 1948 and were met by Detective Martin. Stack was not booked until 2:15 A.M. on that morning. He testified that Captain Hollis and Commissioner Comey were present at the time the statement was signed; that District Attorney Fanelli went with the police to headquarters and that he did not recall how long the District Attorney remained at headquarters that morning. The trip to California by him and Sergeant Christopher was made on Judge Fanelli's suggestion. He did not recall whether or not they took along the statements of the co-defendants Simmons and O'Hara to show to Stack. He

was present at all times on March 30, 1948 when Stack's statement was taken. He did not recall seeing District Attorney Fanelli or Sergeant Christopher using any statements while questioning Stack. He testified that Stack requested counsel in California and also at Yonkers and he refused to sign the statement in California. He testified that no lawyer was provided for Stack in California at the time he waived extradition in California. He testified that Stack signed the statement between the time they arrived at the Yonkers headquarters that morning and the time he was booked and that it was signed in his presence or he would not have signed as a witness thereto. He read the statement to Stack and the latter read it to himself before signing it.

The People then called Patrick Christopher, who testified that he was a police officer for some 37 years and had retired in July of 1963. That in December of 1947 and March of 1948, he was a Detective Sergeant and had participated in the Polito death investigation. He accompanied District Attorney Fanelli and Captain Kennedy to California. After arrival there, District Attorney Fanelli questioned Stack in the presence of Captain Kennedy and himself. He returned to Yonkers with Stack and the others. He testified that Stack was not physically abused on March 30, 31, April 1 and 2, 1948; nor were any threats or promises made against or to Stack by either him or by anyone else in his presence.

On cross-examination, he testified that Stack did not sign the statement in his presence and that Stack was araigned on April 2, 1948 before Judge Gallagher in the Westchester County Court. He testified that on March 30, 1948 in California, he questioned Stack for about one hour and Stack told him that he would speak to District Attorney Fanelli. He did not recall whether Stack asked for a lawyer in California, but he may have done so. He testified that he believes that Stack was told that a lawyer

would be assigned to him when he returned to New York. He did not recall whether District Attorney Fanelli was informed of Stack's request for assignment of an attorney. He had no knowledge whether Stack had previously consulted with any attorney. He testified that District Attorney Fanelli would not talk to Stack unless he was willing to speak to the District Attorney voluntarily.

The defendant, Thomas Stack, testified that he was questioned for 6 to 7 hours in Long Beach, California; that he had asked for an attorney in Long Beach, but this was refused him; that a trustee in the California Jail obtained a lawyer for him by the name of George Van Dyke. The lawyer, who died 6 years ago, advised him to remain silent, which he did regarding the burglary charges there pending against him. That he was exonerated of the burglary charges in California; was released from the jail, re-arrested in San Diego on March 28, 1948, and held for the Long Beach Police Department. He was questioned in Long Beach in regard to the Yonkers murder and requested that George Van Dyke, the attorney, be sent for so that he could be present at the questioning. This request was refused by the police. He was questioned all night and all of the next day and brought before a judge for extradition. He testified that he had continuously requested counsel and that his request was refused. He testified that the Yonkers police first saw him in the afternoon in the Long Beach Jail. He testified that he had been in the Long Beach Jail for 2 days without food prior to the arrival of the Westchester authorities. He was questioned in regard to the murder in Yonkers and he was told that he had been indicted in Westchester County. That the police told him to confess and likewise testified that he asked the Yonkers police to call the said lawyer, George Van Dyke for him. He testified that the Yonkers police refused to get him an attorney and that he asked District Attorney Fanelli to contact the said George Van Dyke and

that District Attorney Fanelli told him that he would be assigned a lawyer in New York State. He testified that he was 21 years of age at the time he signed the waiver of extradition, and that he had been previously convicted. He was not advised that if he was indigent that a lawyer would be appointed for him. The Yonkers police officers showed him two statements, one signed by the co-defendant John Simmons and the other signed by the co-defendant, O'Hara. He testified that he read the statements of his co-defendants and then made his decision as to whether to answer questions. At that time (1948) he had completed only one year of high school. He testified that to him "voluntariness" meant "not received by force". He testified the Yonkers police did not beat him, but that they warned him that he would die in the electric chair if he didn't make a statement. He testified that the police knew that he had a brother in San Francisco, and that between the 27th of March and April 2nd, he was never allowed to contact anyone. He said that he was kept incommunicado and that he did have sufficient money to pay for any phone calls if he would have been permitted to make any. He testified that when they arrived at Yonkers it was midnight and that he had not slept en route from California to Yonkers. He said he was tired from the lengthy trip and was sleepy and perhaps groggy. At Yonkers headquarters he was questioned as to why he did not sign the confession. He subsequently signed the confession. He testified that he had a natural fear of policemen and thought he would be beaten up, but was surprised that he was not. He testified that the word "voluntary" to him meant "not beaten out of him, or taken as a result of physical force or coercion". On April 2, 1948, he was arraigned, was advised of his rights. He did not have a lawyer at that time but that Robert E. Dempsey (now a Justice of the Supreme Court) was subsequently assigned as his counsel.

On cross-examination, he testified that he voluntarily testified at the time of his trial in 1948 and that he was nervous and afraid at that time. He testified that he was mentally coerced at the time he made his confession to the police; but that there was no physical coercion by the Yonkers police officers. He was told by District Attorney Fanelli, during the questioning, but not prior thereto, that anything he said could be used against him. He initialled the pages of the confession on which corrections had been made and signed it. He told District Attorney Fanelli that he was well treated by everyone; that the statement was voluntary and that no promises were made to him by anyone. He testified that he did not tell the County Judge at the time of his arraignment in Westchester County of any threats made to him; nor did he tell the jury on the trial of any threats made to him to the effect that he would "burn in the electric chair", but he did testify at the time of his trial that his statement was voluntary.

Sergeant Christopher, who was called as defendant's witness, testified that his reports indicate that a call came from New York City regarding Stack's arrest in California and that the District Attorney was so notified. Captain Kennedy told Stack that counsel would be assigned to him in New York due to the nature of his case if the defendant were indigent. On cross-examination he testified that Stack's request for an attorney was made before the statement had been taken but he did not recall whether this request was ever repeated in New York. He testified that he did not tell Stack to confess or he would die in the electric chair, nor did he ever tell Stack that if he did not sign the statement he woud die in the electric chair. He did not recall whether Stack was sleepy or tired at the time he made his confession.

The People called Captain Kennedy, who testified that on March 30, 1948, in California, Stack said that he would like to consult with an attorney and was told one would

be assigned to him in New York. He does not recall whether he told District Attorney Fanelli of Stack's request for an attorney. He did not tell Stack to confess or he would die in the electric chair; nor did he ever tell Stack to sign the statement or he would die in the electric chair. He testified on cross that he did not sleep on the return trip from California; that he was not tired but he was fine upon arrival in New York, as was the defendant.

Commissioner William J. Comey testified that in March and April of 1948 he was Deputy Police Commissioner and that on April 2, 1948 saw Stack in the Yonkers police headquarters. He had no recollection of being present at the time Stack signed the statement. He did not at any time tell Stack that if he did not sign the statement he would die in the electric chair; nor did he make any threats or promises to Stack; nor did he physically abuse him in any way. He did not recall whether Stack asked for a lawyer at the time he signed the confession. On cross-examination he testified that District Attorney Fanelli was present at the time of the booking at 2:15 A.M. that morning.

Judge Fanelli was called by the defendant. He testified that the police who accompanied him to California were not agents of the District Attorney's office; but were representatives of the Yonkers Police Department. Stack at no time requested an attorney of him and that he had no knowledge of any request for an attorney made by Stack to the Yonkers police on March 30, 1948. He testified that he at no time heard that the defendant had requested an attorney to represent him prior to questioning.

The defendant's main contentions are: (1) that his request for counsel in California was denied him; (2) that his post indictment statement was inadmissible at the trial and that the statements should be suppressed and a new trial granted. The defendant contends that under the present status of the law, the statement made on March 30, 1948 in California would be declared inadmissible.

Appendix.

The evidence adduced at the hearing clearly shows that the defendant does not contend that he was ever physically abused by the police or by the District Attorney in order to obtain his statement. He does however, maintain that he was told by the police that if he did not confess he would die in the electric chair. This claim is denied by all of the police officers who testified at the hearing and they each contend that they at no time made such threat to the defendant. The defendant testified that to him "coercion meant—being beaten by the police"; however, he makes no claim of being beaten by anyone.

This Court must determine whether the present rules of voluntariness are to retroactively apply to the instant case. Miranda v. Arizona (384 U. S. 436), decided on June 13, 1966, which provides that a defendant must be advised of certain enumerated rights applies only to cases tried after the date of that decision, and therefore, is not applicable to the instant case. (See Johnson & Cassidy v. New Jersey, 384 U. S. 719, decided June 20, 1967.) The failure of the police to fully advise the defendant of those rights back in 1948 is of no consequence. *Johnson* likewise held that the holding in Escobedo v. Illinois (378 U. S. 478) applied only to trials commencing after June 22, 1964 and has no retroactive effect.

The defendant also contends that the request for counsel by the defendant in 1948, per se, bars the admissibility of the statement. He argues that the knowledge of this request for an attorney by the police should be imputed to the District Attorney, they being his agents. The hearing testimony by both the police and the District Attorney clearly recites and shows that the police were at no time acting as agents for the District Attorney and the testimony of Mr. Justice Fanelli (then the District Attorney) clearly shows that he had no personal knowledge that the defendant had made a request for counsel before the defendant's statement was taken.

The defendant further urges that inasmuch as the statement made by the defendant was post indictment and post arraignment, it was therefore inadmissible, citing People v. Di Biasi (7 N. Y. 2d 544), People v. Waterman (9 N. Y. 2d 561) and People v. Meyer (11 N. Y. 2d 162) which, in essence, hold that a statement taken from an accused after indictment and without the presence of counsel is inadmissible as being in violation of his constitutional rights. But the rights set forth in *Di Biasi* and *Waterman* have been held not to be retroactively applied in People v. De Renzio (19 N. Y. 2d 45). This argument of the defendant is therefore, likewise untenable.

Defendant also contends that the District Attorney was duty bound to divulge exculpatory information to the defendant's attorney and his failure to inform him that he knew that the Yonkers police reports reflected that the defendant had requested counsel was a breach of that duty. The defendant has made no showing upon the hearing that the People had exculpatory or other evidence which they intentionally withheld and District Attorney Fanelli testified that he had no personal knowledge of the defendant's request for counsel, nor did he have any knowledge of what the police reports contained, therefore, this argument is likewise without merit.

The holding in People v. Bodie (16 N. Y. 2d 275), which deals with post indictment statements or admissions and their voluntariness, is not retroactive. This Court has so held in People v. Stockford, which was affirmed in 28 A. D. 2d 713 (24). The failure of the People to advise the defendant of his rights before taking a statement from him in 1948 does not defeat the admissibility of such statement.

From all of the credible evidence adduced at this hearing, the Court, therefore, finds beyond a reasonable doubt:

(1) That the statement made by the defendant to then District Attorney Fanelli in California in 1948, which was

later signed in Yonkers, New York, was not made under the influence of fear produced by threats or actual physical abuse to his person, nor was it made as a result of any promise by the District Attorney of leniency, but was in all respects voluntarily made.

(2) That the District Attorney at the time he took the statement from the defendant had no knowledge that the defendant had made any requests of the police officers for counsel in California.

(3) That the defendant was not advised of the rights as subsequently set forth in Miranda v. Arizona (supra); such advice not having been required to have been given at that time. (See Johnson v. New Jersey, supra)

The Court makes the following conclusion of law; that the statement of the defendant was then admissible in evidence and was properly received in evidence against him at the trial in 1948.

Submit order on notice.

Dated: White Plains, N. Y.
March 27, 1968

/s/ P. Raymond Sirignano
County Court Judge

Hon. Leonard Rubenfeld
District Attorney
Samuel Boxer, Esq.
Attorney for Defendant